In the

United States Circuit Court of Appeals

for the

Ninth Circuit

No. 9924

B. T. McCauley, Director of Game of the State of Washington, B. M. Brennan, Director of Fisheries of the State of Washington, E. M. Benn, Inspector of the Department of Fisheries of the State of Washington, and Guy Burnham, Game Protector of the State of Washington,

Appellants,

vs.

Makah Indian Tribe, a corporation, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarthy and Harold Ides, individually and members of the Council of the Makah Indian Tribe,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' REPLY BRIEF

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STATE PRINTING PLANT, OLYMPIA, WASHINGTON

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Does This Case Involve "The Power of the State to Impose Some Type of Regulation" on the Exercise of the Fishing Rights in Question?

Appellees state:

"* * * We are not now concerned with the power of the state to impose some type of regulation. Whatever

power it may have to regulate the exercise of the fishing rights, may it go further and altogether prevent their exercise?" (Appellees' brief, page 11. See, also, page 22.)

Appellants cannot agree with that statement as to the basic issue in the case. We insist that the converse is actually the case. While it is true that it was pleaded that appellants have "intentionally prevented any fishing by the Makah Indians in any part of the Hoko River" (Appellees' brief, p. 3), appellants' acts were pursuant to *regulatory* statutes of the State of Washington.

Appellees, on the contrary, prayed that appellants be permanently enjoined and restrained

"* * * from *in any manner whatsoever* interfering with or depriving the plaintiffs (appellees) herein, or any of the members of the Makah Tribe of Indians of their rights and privileges of fishing in their usual and accustomed fishing place hereinabove described." (Tr. 10.)

Likewise, the decree appealed from permanently enjoins and restrains appellants

"* * * from *in any manner whatsoever* interfering with the exercise by the plaintiffs (appellees) herein, or any of the members of the Makah Indian Tribe, of their rights and privileges of fishing in their usual and accustomed place hereinabove described * * *" (Italics supplied.) (Tr. 57.)

Not only has the entire case been litigated on the basis of the power of the State of Washington to *regulate* the fishing rights in question, but there cannot be the slightest question but that under the pleadings and under the decree appealed from the State of Washington has been permanently enjoined from any act of regulation, regardless of the nature of the regulation involved.

Appellants *do not* claim the right to "take away" any right granted by the treaty in question. They seek only to subject some of those rights (the "off the reservation" fishing rights) to the regulatory statutes of the state, on

a non-discriminatory basis. Whereas the fishing rights granted by the treaty on the Indian reservation and in streams bordering the reservation are exclusive, the "off the reservation" rights were granted "in common with all citizens." As to the exclusive rights granted by the treaty, the State of Washington does not even insist upon the power to regulate. But as to the rights simply granted "in common with all citizens," the State of Washington insists that those rights are on a parity with similar rights possessed by all citizens, and are to be exercised under the same conditions as our the similar rights possessed by non-Indians.

Even the licensing statute to which appellants contend appellees are subject is purely *regulatory* in character. The statute, section 1, chapter 149, Laws of Washington, 1937 (Remington's Revised Statutes (Supp.), section 5703) reads:

"Licenses herein required *shall* be issued to any qualified person * * * upon the receipt of a lawful application therefor, upon a blank to be furnished for that purpose accompanied by the receipt of the state treasurer for the required fee, and the director of licenses shall cause to be indorsed on such application the number of the license issued and the date of issue, and transmit the application to the director of fisheries and game. All applications for licenses shall be filed with the state treasurer accompanied by the proper fee, which shall be respectively as follows: * * *"

(The disqualifications are set forth in section 1, chapter 170, Laws of 1929 (Remington's Revised Statutes, section 5695), which specifically provides that:

"Nothing herein contained shall be construed to prevent the issuance of licenses to Indians, providing such applicants possess the qualifications of residence herein required, * * *")

It will be noted that the statute vests no discretion in the licensing officials. Issuance of a license is *mandatory* upon compliance with the purely formal requirements of the statute. The licensing provisions are thus only regulatory in nature. No "taking away" of any privilege is contemplated or made possible.

"It is well settled that the state under its police power has the right to regulate any business, occupation, trade, or calling in order to protect the public health, morals and welfare, subject to the restrictions of reasonable classification. *This power to regulate includes the power to license;* and it is the settled general rule that to protect the health, morals, and welfare of the public a state can license an occupation, trade, or calling." 33 Am. Jur. 336, Licenses, Section 17. (Italics supplied.)

Has Ward v. Racehorse Been Overruled by Missouri v. Holland?

Appellees state:

"* * * It is well established, however, that the state cannot, even in the exercise of its police power, curtail treaty rights. In 63 C. J., p. 844, Sec. 27, the rule is stated:

"'A treaty must be regarded as part of the law of a state as much as are the state's own local laws and constitution, and is effective and binding on the state legislature. So a treaty may override the power of the state even in respect of the great body of private relations which usually fall within the control of the state; and the treaty-making power is superior to the reserved powers of the state, including the police power, provided the subject matter of the treaty is not arbitrary and disconnected and remote from international intercourse.'" (Appellees brief, p. 28.)

The *sole* authority cited by Corpus Juris in support of the pertinent portion of the above quotation is *Missouri v. Holland,* 252 U. S. 416, 64 L. Ed. 641.

As pointed out in our opening brief, *Ward v. Racehorse,* 163 U. S. 504, 41 L. Ed. 244, 16 S. Ct. 1076; *Coyle v.*

Smith, 221 U. S. 559, 55 L. Ed. 853, 3 S Ct. 688; and *State ex rel. Kennedy v. Becker,* 241 U. S. 556, 60 L. Ed. 1166, 36 S Ct. 705, hold otherwise, and the question thus resolves itself into whether or not the effect of those decisions has been cut down or nullified by the decision in *Missouri v. Holland, supra.* That such is actually the effect of appellees' contention is apparent from the statement on page 32 of their brief, where they say:

"So far as the *Race Horse* case may be taken to hold that no treaty of the United States may abridge the police power of the state it must be considered overruled by *Missouri v. Holland,* 252 U. S. 416, 64 L. Ed. 641 * * *"

It will be noted that *Ward v. Racehorse, supra, Coyle v. Smith, supra,* and *State ex rel. Kennedy v. Becker, supra,* all of which support appellants position, are not so much as mentioned in the *Missouri v. Holland* opinion. Had it been the intention of the Court to overrule or cut down the effect of those decisions, it obviously would have made some reference to them, since each of those cases was cited to the court (see 64 L. Ed. 645).

Furthermore, the basis for the decision in *Missouri v. Holland* is clearly indicated in the concluding paragraph of the opinion, which reads:

"Here a *national* interest of very nearly the first magnitude is involved. It can be protected *only* by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of the opinion that the treaty and statute must be upheld.

Carey v. South Dakota, 250 U. S. 118. * * * " (Italics supplied.)

In the instant case, on the other hand, we are concerned with the opposite situation—a *local* rather than a national interest is involved, and reasons which, in *Missouri v. Holland,* called for the supremacy of the Federal statutes, in the instant case call for the supremacy of the state regulatory statutes. In *Missouri v. Holland,* the Court was of the opinion that to hold the state statutes valid would be to prevent effective bird conservation. In the instant case, on the contrary, effective fish conservation depends upon the validity of the statute in question. Every fishing place in the State of Washington is a "usual and accustomed" fishing place for some tribe of Indians, and if Indians are free, under the typical treaty provisions here in question, to fish when, where, and how much they please, effective fish conservation is *impossible.*

Are Ward v. Racehorse, State Ex Rel. Kennedy v. Becker, and U. S. v. Winans Distinguishable?

Appellees have attempted to distinguish the cases of *Ward v. Racehorse,* 163 U. S. 504, 41 L. Ed. 244, 16 S. Ct. 1076, and *State ex rel. Kennedy v. Becker,* 241 U. S. 556, 60 L. Ed. 1166, 36 S. Ct. 705, and, in the case of *U. S. v. Winans,* 198 U. S. 371, 49 L. Ed. 1089, 25 S. Ct. 662, assert that the pertinent portion of the opinion is dictum.

(1) Ward v. Racehorse.

As to the case of *Ward v. Horsehorse, supra,* appellees' position is based upon what is asserted to be

" * * * certainly a strong implication at least that rights which are not 'essentially perishable and intended to be of a limited duration' but which, like the Makahs,' are permanently reserved, cannot be destroyed by the state." (Appellees' brief, p. 18.)

And, at page 30, after admitting that

"there is language in the Race Horse case that suggests that the Enabling Act might have such an operation" (i. e. that it might cut down treaty rights as "against the police power of the State"),

appellees insist:

"* * * but the Court could not have intended to so hold."

We will let the language of the decision speak for itself.

(2) State Ex Rel. Kennedy v. Becker.

State ex rel. Kennedy v. Becker, supra, on the other hand, is sought to be distinguished on the basis of the statement in that opinion that:

"* * * the existence of the sovereignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty *whether fully appreciated or not.*" (Appellees' brief, page 19; italics supplied.)

Appellees then go on to state:

"It is of no significance that the Indians did or did not appreciate the sovereign power of the United States Government. It must be conceded that the United States Government may impair the treaty rights, if it chooses, * * * We are here concerned with the power of the state and the question is whether the Indians understood that their right to fish was subject to the sovereign power of the state. However, only by recourse to fancy can it be conceived that the Indians understood that the United States Government itself could, without violence to the treaty, abrogate the fishing rights in question, in the name of conservation. (In fact, it is most probable that the Makahs had no conception at all of sovereignty as we understand it. * * *" (Appellees' brief, page 20.) (Original italics and parenthesis.)

Frankly, we fail to see the logic of appellees' position. After conceding that the treaty rights are subject to the sovereign power of the United States Government despite

the fact that "it is most probable that the Makahs had no conception at all of sovereignty as we understand it," appellees insist that the sovereign power of the State of Washington *is* cut down because the Indians did not understand that their rights were subject to the sovereign powers of the State. Furthermore, we fail to see how the fact of understanding or lack of understanding by the Makahs or by anyone else can have any effect on the extent of the sovereign powers of the State of Washington.

(3) UNITED STATES v. WINANS.

Appellees state:

"It is true that in *United States v. Winans, etc.*, 198 U. S. 371, 25 S. Ct. 662, 49 L. ed. 1089, the court, referring to a treaty similar to the one at bar, said,

"' * * * nor does it restrain the state unreasonably if at all, in the regulation of the right.'

"The statement is *dicta* because the case involved merely the right of the Indians as against a private individual who had acquired title * * *" (Appellees' brief, page 23.)

A reading of the opinion will show that the statement in question was part of the court's direct answer to the contention " * * * that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission into the Union." Furthermore, in *State ex rel. Kennedy v. Becker, supra,* the court expressly recognized *United States v. Winans, supra,* as authority for the proposition that the treaty rights in question are " * * * subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised," which question was directly before the court for decision in the latter case.

COYLE V. SMITH.

As pointed out in appellants' opening brief, the Supreme Court, in *Coyle v. Smith,* 221 U. S. 559, 55 L. Ed. 853, 3 S. Ct. 688, had occasion to hold:

"The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

"This deduction finds support in * * *Ward v. Race Horse,* 163 U. S. 504; * * * " (Page 573.)

(As indicated in our opening brief, at page 30, the citation of *Ward v. Racehorse, supra,* clearly indicates that the enunciated rule applies to limitations imposed by prior treaties as well as to those inserted in enabling acts.)

And at page 576 of the *Coyle* opinion, the Court *expressly* construed *Ward v. Racehorse, supra,* as direct authority for the very position that appellants take in this case, when it said:

"In *Ward v. Race Horse, supra,* the *necessary* equality of the new State with the original States is asserted and maintained against the claim that the police power of the State of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the State of Wyoming." (Italics supplied.)

It is still our contention that the principle so clearly enunciated by the Court in *Coyle v. Smith, supra,* is decisive of this case, in appellants' favor. It will be noted that appellees, in their brief, have not so much as mentioned that decision.

CONCLUSION

Accordingly, it is submitted that the fishing rights in question are subject to the paramount and superior right of the State of Washington, in the exercise of its sovereign police power, to regulate the taking of fish from the water within its jurisdiction, and that, therefore, the judgment of the District Court should be reversed and the permanent injunction dissolved.

Respectfully submitted,

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